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No. 00-619

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IN THE

Supreme Court of the United States

REGAL CINEMAS, INC.,

Petitioner,

v.

CITY OF MAYFIELD HEIGHTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF MAYFIELD HEIGHTS, CITY OF MIDDLEBURG HEIGHTS AND CITY OF SOLON AND THEIR RESPECTIVE OFFICIALS

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QUESTIONS PRESENTED

1. Do admissions tax ordinances requiring Petitioner to collect a tax from its patrons violate Petitioner's right to free speech protected by the First Amendment?

2. Does strict scrutiny or intermediate scrutiny apply in reviewing the constitutionality of a content-neutral admissions tax ordinance?

3. Does the Petitioner have the burden of establishing that a content-neutral admissions tax is unconstitutional as applied?

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STATEMENT OF THE CASE

More than 40 years ago the four municipal Respondents duly adopted ordinances imposing an admissions tax on recreational activities conducted within their respective municipalities. The admissions tax is imposed upon every person who pays an admissions charge to any place. The term "place" includes theaters, dance halls, amphitheaters, auditoriums, stadiums, baseball and athletic parks, swimming pools and other types of facilities. Petitioner mischaracterizes the admissions tax when it states at page 3 of its Petition that: "Each ordinance requires the tax to be paid either by the patron or the vendor, but imposes ultimate responsibility for payment on the vendor." Contrary to the Petitioner's assertion, each of the admissions tax ordinances involved in the within matter expressly states that the admissions tax is to be paid by the patron and requires the business entity to collect the tax and remit it to the municipality. If the business entity fails to collect the tax, then it is liable to the municipality for the amount of the tax that it should have collected from its patrons.

For more than 30 years, the admissions taxes were paid by persons who were not patrons of Petitioner's theater businesses. It is only in recent years that market forces conducive to the expansion of movie theaters have resulted in more patrons and in movie theater patrons paying a substantial portion of the total admissions tax collected by the municipal Respondents. In past years, patrons of bowling alleys, golf courses and amusement activities paid most of the admissions tax receipts.

During the 1990's, long after the admissions tax ordinances were enacted by the Respondent municipalities, the Petitioner established movie theater businesses within the territorial jurisdictions of each of the Respondent municipalities. Prior to establishing the movie theater businesses in Respondent City

of Middleburg Heights and in Respondent City of Mayfield Heights, the Petitioner caused information to be furnished to each of the aforesaid Respondents indicating that the Petitioner would annually collect more than $100,000 of admissions taxes from its patrons which would then be remitted to the municipality. Petitioner acknowledged that its movie theater businesses attract large crowds of people and motor vehicles into a small geographic area during a concentrated time, resulting in altercations, accidents and injuries and engendering the need for additional police, fire and emergency medical services.

Petitioner claims that the admissions tax as applied violates the First Amendment and the Constitution of the State of Ohio. At the trial of the within action, Petitioner conceded that its claim is founded upon the possibility of censorship of films and not upon any threat or effort by the Respondents to censor Petitioner's exhibition of films. Indeed, within a five-year period from 1991 through 1996, the Petitioner expanded its business from eight movie theater screens in one municipality to a total of 49 movie screens located in all of the Respondent municipalities. Such a rapid expansion contradicts any notion that the Petitioner has in any way been restrained by the admissions tax. Nevertheless, the Petitioner continues its argument at page 16 of its Petition that it is the "potential for censorship" and not censorial statutory language or declared censorial intention which requires the application of a strict scrutiny standard. However, since there is no evidence establishing a burden on free speech, or a singling out of the Petitioner for taxation, strict scrutiny does not apply. Furthermore, there is a particular justification for the tax because the activities of the Petitioner attract large crowds of people and motor vehicles resulting in the need for added safety services all of which add to the cost burden upon the Respondent municipalities.

The issue in the instant matter is not constitutional impairment but rather profit impairment. The Petitioner's internal accounting procedure does not segregate the admissions tax from the total price charged to its patrons. Nevertheless, the Petitioner concedes that the price charged to its patrons includes a profit margin to the Petitioner even after considering the admissions tax imposed by the ordinances. Obviously, if the Petitioner was not required to remit the admissions taxes to the Respondent municipalities, it would retain the total price charged, including the admissions tax portion, and thereby enhance its profitability.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition for Certiorari because:

1. The Petitioner's allegation of a constitutional impairment is without substance and does not present a substantial constitutional question for consideration by this Court. The admissions tax ordinances impose an admissions tax on patrons who use recreational activities and require the business entity to collect the admissions tax from its patrons and to remit the tax to the municipality. The admissions tax ordinances apply to theaters, dance halls, amphitheaters, auditoriums, stadiums, baseball and athletic parks, swimming pools and other types of facilities. The admissions tax ordinances do not single out First Amendment activities as alleged by the Petitioner, but apply to numerous non-First Amendment activities.

2. The strict scrutiny standard advocated by the Petitioner does not apply to the admissions tax ordinances for the reason that they are content-neutral and there is no evidence establishing a burden on free speech, or a singling out of the Petitioner for taxation. Moreover, there is a particular justification for the tax because the activities of the Petitioner

attract large crowds of people and motor vehicles in a small geographic area during a concentrated time, resulting in altercations, accidents and injuries and the need for added police, fire and emergency medical services which impose a greater cost burden upon the Respondent municipalities.

3. Since the admissions tax ordinances are content-neutral, they are not presumed to be invalid under the First Amendment.

4. The Ohio courts in considering whether the admissions tax ordinances violated Article I, Section 11 of the Ohio Constitution correctly accorded the admissions tax ordinances the presumption of constitutionality. The Ohio courts also correctly determined that insofar as the Ohio Constitution was concerned the presumption of constitutionality could only be overcome by proof beyond a reasonable doubt.

ARGUMENT

1. Admissions Tax Ordinances Requiring Petitioner To Collect A Tax From Its Patrons Do Not Violate Petitioner's Right To Free Speech Protected By The First Amendment.

Petitioner claims that the admissions tax ordinances as applied to the Petitioner violate the Petitioner's right to free speech protected by the First Amendment. Petitioner asserts that notwithstanding the fact that the admissions tax ordinances do not expressly impair Petitioner's right to free speech and notwithstanding the fact that the admissions tax ordinances were not intended to affect Petitioner's right to free speech, that the strict scrutiny standard of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) should be extended and applied to the instant case. Respondents disagree. The strict scrutiny standard does not apply because there is no evidence establishing a burden on free speech, or a

singling out of the Petitioner for taxation and furthermore, there is a particular justification for the admissions tax. Respondents submit that the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367, 376 (1968) is applicable. The admissions tax ordinances comport with the intermediate scrutiny standard because the admissions tax is within the constitutional power of the Respondents, furthers an important governmental interest which is unrelated to the suppression of free expression and does not restrict free speech. Respondents submit therefore that the Petitioner's right to free speech is not violated by the admissions tax ordinances.

A. Strict scrutiny does not apply where there is no evidence establishing a burden on free speech, or a singling out of the Petitioner for taxation, and where there is evidence of a particular justification for the tax.

Relying on this Court's ruling in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), Petitioner mistakenly contends that the "strict scrutiny" standard should be used to review the municipal action in this case. Petitioner seeks to extend *Minneapolis Star* to a significantly different set of facts. The admissions tax ordinances at issue do not single out a First Amendment speaker and do not treat movie theaters differently. To apply *Minneapolis Star* to the instant facts would result in an expansion of the strict scrutiny standard. In *Minneapolis Star*, this Court held unconstitutional a narrowly drawn tax that was structured in a manner that appeared as if its goal was to suppress protected First Amendment expression. The tax in that case exempted the first $100,000 in newsprint and ink expenses. As a result, only the largest newspapers in the state had to pay the tax, which gave the tax the appearance of being content-based since it was the content of the large newspapers which presumably resulted in their being treated differently than smaller newspapers that

used less paper and ink. The Court's determination that the government action was content-based resulted in the use of strict scrutiny review. The tax in the instant case is not content-based, it is content-neutral and, thus, there cannot be an inference that the goal of the tax was to interfere with First Amendment activities.

The admissions tax in question is content-neutral in two respects: first, it applies to both First Amendment-protected venues (e.g., theaters) and non-protected venues (e.g., sporting events, circuses); second, it applies to all theater patrons regardless of the content of the film being shown (whether, for example, "Bambi" or "Pulp Fiction"). The tax also has no effect on a theater's ability to exhibit motion pictures. *See Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 375 (3d Cir. 1986) (strict scrutiny is not warranted where the regulation does not directly impinge upon the expressive aspect of moviemaking activities, as did the state taxation of ink and paper used by the press in "*Minneapolis Star*").

In fact, this Court has recognized that under *Minneapolis Star*, strict scrutiny is unwarranted when the differential treatment of First Amendment activities is "justified by some special characteristic" of the particular medium being taxed. *Turner Broadcasting v. F.C.C.*, 512 U.S. 622 (1994), citing *Minneapolis Star* at 585. *See also National Amusement, Inc. v. Town of Dedham*, 43 F.3d 731, 741 (1st Cir. 1995); *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 375 (3d Cir. 1986). "Secondary effects," such as traffic and security problems associated with a complex containing 12 movie theaters, can comprise a "special characteristic" of a particular medium precluding strict scrutiny. *Dedham* at 740.

In this case, the admissions tax is justified by the special characteristics of Petitioner's mega-movie theater business,

which generates crowds of people and vehicles and gives rise to the need for additional safety services. Thus, strict scrutiny is unwarranted.

Petitioner argues that in recent years it has paid a disproportionate amount of the admissions tax. In essence, Petitioner asserts that because it has been so successful in expanding its theater businesses it remits a greater amount of the admissions tax to the Respondents. Petitioner interprets these facts as being violative of its constitutional right to free speech. Petitioner's position is in error for at least two reasons. First, no tax whatsoever is imposed upon the Petitioner. The Petitioner does not pay any admissions tax. The admissions tax is imposed upon persons who pay the admission charge, that is the patrons. Second, the admissions tax is directly related to the more frequent and increased safety services demanded by the large crowds and vehicular traffic generated by Petitioner's theater businesses. The additional safety services required by the Petitioner's business operations generate greater costs to the Respondent municipalities. Accordingly, the admissions tax is not disproportionate, but rather, it is congruous with the safety services received by Petitioner's patrons and businesses.

The imposition of the admissions tax on patrons of the movie theaters and the requirement that the Petitioner collect and remit the tax to the Respondent municipalities does not impair any constitutionally protected free speech rights. The admissions tax is warranted by the characteristics of the movie theater businesses which generate crowds of people and vehicles and give rise to security issues. The admissions tax does not in any way restrict or censor the display of movies. The interest of the municipalities in imposing the tax on the users of the theaters who generate the need for city services is reasonable.

B. The imposition of an admissions tax is within the constitutional power of the municipal Respondents, furthers an important or substantial governmental interest which is unrelated to the suppression of free expression, and has only an incidental restriction on free speech no greater than is essential to further the governmental interest and therefore, does not offend the First Amendment freedoms.

The appropriate test for determining the constitutionality of the admissions tax ordinances is articulated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "when 'speech' and 'nonspeech' elements are combined in the same course of conduct." Under *O'Brien*,

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

Even after *Minneapolis Star*, the admissions tax ordinances are subject to the *O'Brien* "intermediate scrutiny" standard of review. *See Wayte v. United States*, 470 U.S. 598 (1985). *See also Associated Film*, 800 F.2d at 374; *Minneapolis Star*, 460 U.S. at 585 n.7 (referring to *O'Brien* approvingly as consistent with its analysis).

The admissions tax in the instant case complies with each prong of the *O'Brien* test. The imposition of the admissions tax is within the constitutional power of the Respondents. The important governmental interest served by the imposition of the tax is the raising of revenue

for traffic, crowd control, and security issues associated with the theater and enhancing order and tranquillity which would be achieved less efficiently absent the tax. *See Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 at 586 (1983) (raising revenue is "critical"). The governmental interest is unrelated to the suppression of free expression. Moreover, Petitioner agrees that the express provisions of the admissions tax ordinances do not restrict free speech. Rather, the Petitioner asserts that the admissions tax ordinances may be applied to restrict free speech and that the possibility of such an application violates the First Amendment. In effect, Petitioner urges this Court to reject the *O'Brien* test and to extend *Minneapolis Star* even though there is no evidence establishing a burden on free speech or a singling out of the Petitioner for taxation. Respondents respectfully disagree with the Petitioner and urge this Court to reject the invitation to extend *Minneapolis Star* since the admissions tax ordinances do not treat the movie theaters differently from other enterprises and do not target particular theaters or movies.

2. The Petitioner Has The Burden Of Establishing That The Application Of The Admissions Tax Ordinances Deprives It Of A Constitutional Right.

A. Because the admissions tax ordinances are content-neutral, they are not presumed invalid under the First Amendment.

As noted by this Court, so long as legislation is content-neutral, the legislation is not presumed invalid under the First Amendment. *Turner Broadcasting v. F.C.C.*, 512 U.S. 622 (1994). Also, pursuant to this Court's decisions, the burden remains with the Petitioner to demonstrate that it has been deprived of a constitutional right by the application of the

ordinances to it. *See United States v. O'Brien*, 391 U.S. 367 (1968); *Leather v. Medlock*, 499 U.S. 439 (1991). For the reasons stated above, Petitioner failed to meet its burden.

B. The Ohio Courts correctly imposed the standard of beyond a reasonable doubt with respect to the Petitioner's claim that the admissions tax ordinances violated Article I, Section 11 of the Ohio Constitution.

The Petitioner has alleged that the admissions tax ordinances violated the First Amendment and also violated Article I, Section 11 of the Ohio Constitution. In considering the alleged violation of the Ohio Constitution, the Ohio courts are required to presume the constitutionality of legislative enactments. *State, ex rel. Jackman v. Court of Common Pleas*, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967). Pursuant to Ohio law, the presumption can only be overcome by proof, beyond a reasonable doubt, that the legislation and the Ohio Constitution are clearly incompatible. *State, ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955); *Arnold v. City of Cleveland*, 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993). The Ohio courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional under the Ohio Constitution. *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). The Ohio courts acted in accordance with the applicable Ohio law in considering whether or not the admissions tax ordinances violated Article I, Section 11 of the Ohio Constitution and correctly applied the standard of beyond a reasonable doubt.

CONCLUSION

For the reasons and authorities stated above, Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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